

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: April 11, 2007
Decided: April 13, 2007

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RE: Viking Pump, Inc. v. Liberty Mutual Insurance Co.
C.A. No. 1465-VCS

Dear Counsel:

This letter responds to separate motions filed by John Crane, Inc. and Liberty Mutual Insurance Company, respectively, regarding the April 2, 2007 Memorandum Opinion resolving the parties' Phase I cross-motions for summary judgment in the above-captioned matter. I address the two motions separately.

John Crane's motion takes issue with the accuracy of two passing statements in the opinion that discuss John Crane's relation to Houdaille. I do not share John Crane's belief that those two statements have the potential to cause injury to John Crane or to be used unfairly against John Crane in future litigation. They appear in the introductory

sections of the opinion and provide background context to help the reader understand the nature and procedural posture of the case. Nonetheless, one of the statements to which John Crane objects is arguably inaccurate.¹ The other potentially could be read as suggesting a legal conclusion regarding an issue that has not yet been litigated in this case.² John Crane's request for relief, which asks for very minor changes to two sentences in the opinion, is reasonable and narrowly tailored to the protection of its interests. Therefore, I grant John Crane's motion and have issued a corrected Memorandum Opinion to address its concerns.

Liberty Mutual's motion, however, does not stand on the same footing. It requests modification or redaction of the opinion to remove all references to certain documents that were created by its attorneys in 1986 and 1987. Liberty Mutual submitted those documents to the court for consideration with the Phase I summary judgment motions, subject to a Stipulation and Order Re: Non-Waiver of Privilege dated February 7, 2007 (the "Stipulation"). Liberty Mutual contends that the references to these documents should be excised from my opinion and removed from the public record. I disagree with

¹ The opinion suggested, at page five, that John Crane had contractually assumed *all* of Houdaille's liabilities. John Crane points out that the contract involved contains language that purports to limit John Crane's assumption of Houdaille's liabilities by excluding contingent liabilities that were not yet enforceable against Houdaille as of the date of the contract.

² The opinion, at page one, refers to John Crane as the "successor" to Houdaille with respect to the insurance policies involved in this case. Questions regarding the extent of John Crane's rights and obligations under those insurance policies were not at issue in the Phase I summary judgment motions and have been reserved for future stages of the litigation.

this request for an Orwellian revision of the record. There is no basis for granting this extraordinary relief.

For one thing, the allegedly privileged documents that are the subject of Liberty Mutual's motion are more than twenty years old and do not contain any sensitive information that could potentially harm Liberty Mutual's present interests. In fact, Liberty has not even suggested how it might be harmed by public access to the information contained in the opinion, except to generically assert that the requested modifications or redactions are necessary to protect communications that are subject to attorney-client privilege, in a situation when the privilege had likely been waived already. As a result, Liberty Mutual has not demonstrated the substantial need required to justify limiting the public's access to this court's judicial work product.³

The documents involved in Liberty Mutual's motion were provided in response to a letter to counsel, dated February 8, 2007, in which I asked the parties to submit those documents in connection with the Phase I summary judgment motions. In doing so, I noted that any privilege that might otherwise have applied to those documents appeared to have been waived when Liberty Mutual put at issue its knowledge of Warren Pumps

³ See *Tenneco Auto, Inc. v. El Paso Corp.*, 2005 Del. Ch. LEXIS 211, at *2 (explaining that the public has a significant right to know what happens in its courts, that decisions limiting access will be rare, and that a party seeking to withhold this court's work from the public must show "good cause demonstrating substantial need for maintaining confidentiality").

LLC's corporate history and the basis on which Liberty Mutual had extended insurance coverage to Warren Pumps over the last twenty years.⁴

I continue to believe that there is a strong basis in the record to conclude that Liberty Mutual waived its privilege under the "at issue" exception to the attorney-client privilege. Under that doctrine, a party puts its attorney-client communications "at issue," thereby waiving the privilege, when it (1) injects the attorney-client communications into the litigation; or (2) injects an issue into the litigation, the truthful resolution of which requires an examination of attorney-client communications.⁵ Liberty Mutual repeatedly contended that it had extended coverage to Warren Pumps on the mistaken belief that Warren Pumps was a "former subsidiary or division" of Houdaille and not a mere assignee of certain assets.⁶ Liberty charged Warren Pumps with making numerous misrepresentations in this regard and contended that, had it known the truth, it never would have agreed to provide the insurance coverage.⁷ Therefore, Liberty Mutual's

⁴ See Letter to Counsel (February 8, 2007), at 2.

⁵ E.g., *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 59 (Del. Ch. 2005).

⁶ See Liberty Mutual's Brief in Opposition to Warren Pumps LLC's Motion For Summary Judgment, at 40-41 ("The Court should reject [Warren Pumps's] argument that Liberty Mutual waived its right to enforce the Insurance Policies' anti-assignment provisions by providing insurance benefits to [Warren Pumps], where Liberty Mutual provided such benefits . . . in response to erroneous representations that [Warren Pumps] was a former subsidiary or division of Houdaille and entitled to coverage on that basis.")

⁷ *Id.* at 41 ("It is therefore of the utmost significance that in seeking coverage under the Insurance Policies on behalf of [Warren Pumps], [Warren Pumps's] parent company IMO affirmatively, misleadingly, and repeatedly represented to Liberty Mutual that [Warren Pumps] . . . was a former division or subsidiary of Houdaille and, thus, entitled to coverage as a named insured under the Insurance Policies."); Liberty Mutual's Memorandum in Support of Liberty Mutual's

subjective state of mind regarding its understanding of the 1985 Warren Pumps transaction and why it decided to extend coverage to Warren Pumps beginning in 1987 were important issues Liberty Mutual itself injected into the case. Because the initial record submitted was devoid of evidence on these issues, the surviving documents reflecting the advice Liberty Mutual received from its attorneys regarding the nature of the 1985 Warren Pumps transaction and the extent of Liberty Mutual's obligations to Warren Pumps and the buyers of the other businesses Houdaille sold around the same time were relevant to reliably determining what Liberty Mutual knew and when.⁸

In any event, I need not determine whether Liberty Mutual actually waived the attorney-client privilege, and I will not entertain further briefing or argument on that issue. In the Stipulation, Liberty Mutual expressly consented to allow the documents to be considered as part of the substantive basis for the court's decision on the Phase I summary judgment motions. As a result, it cannot now complain that quotations from or summaries of those documents appear in the court's opinion. The court's use of those

Phase I Motion for Summary Judgment Against Warren Pumps LLC, at 21 ("In seeking coverage on behalf of [Warren Pumps] under the Insurance Policies, IMO did not disclose to Liberty Mutual that [Warren Pumps] was never a Houdaille subsidiary or division. Nor did IMO disclose that [Warren Pumps] was a separate company that was formed in 1985 to acquire assets from Old Warren. IMO said nothing to indicate that New Warren's coverage claims depended on an alleged assignment of rights under the Insurance Policies."); *see also* Affidavit of Jennifer R. Devery, Ex. O (providing specific examples of the alleged misrepresentations).

⁸ *See, e.g., Tenneco Auto Inc. v. El Paso Corp.*, 2001 WL 1456487, at *4 (Del. Ch. 2001) (noting that the "at issue" exception is premised upon the rationale of fairness and that confidential information may be tapped only when the needed information cannot be reliably obtained from another source).

documents complied fully with the Stipulation, which provided that the documents “may . . . be used in connection with the pending Phase I partial summary judgment motions *and the court’s consideration of the same.*”⁹ Liberty Mutual understood that the allegedly privileged documents would be relied upon by the court in resolving the Phase I summary judgment motions and expressly consented to the documents being used in the court’s decision.

The documents about which Liberty Mutual complains formed part of the substantive basis for the April 2 decision. The alterations Liberty Mutual requests would involve the wholesale removal of all references to key undisputed facts relevant to its state of mind during the crucial period. As a result, the requested alterations would risk not only causing the entire opinion to be misleading in that they would obscure some of the reasons for the decision, but they would also risk giving the decision, which was a narrow ruling based on a particular set of fairly extraordinary facts, precedential import that was not intended.

Finally, the court’s April 2 decision does not affect any of Liberty Mutual’s rights regarding privileges that might apply to the documents in question in the future in other contexts. The Stipulation remains validly in place and expressly allows Liberty Mutual to attempt to assert all privileges in the future. Nor does my decision relieve any of the other parties of any confidentiality obligations they have regarding the documents in

⁹ Stipulation, at 3 (emphasis added).

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question. For all of these reasons, I deny Liberty Mutual's motion. IT IS SO
ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor

cc: Register in Chancery